

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

75-7672

United States Court of Appeals

For the Second Circuit.

PANAGANGELOS ANTYPAS,

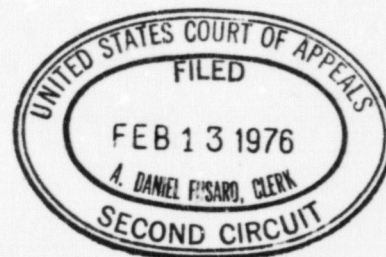
Plaintiff Appellant,

-against-

CIA. MARITIMA SAN BASILIO, S.A. and P.D.
MARCHESSINI AND CO. (HELLAS) LTD. and P.D.
MARCHESSINI AND CO. (NEW YORK), INC. and the SS
EURYBATES, her boats, engines, tackle and apparatus.

Defendants-Respondents.

PLAINTIFF-APPELLANT'S REPLY BRIEF



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TABLE OF CASES

	<u>Page</u>
Bartholomew v. Universe Tankships Inc., 263 F.2d 437	3, 5
Brillis v. Chandris (U.S.A.) Inc., 215 F.Supp. 520	2
Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 795	4
Damaskinos v. Societa, 255 F.Supp. 919	5
Dassigienis v. Cosmos Carriers & Trading Corp., 321 F.Supp. 1253	5
England v. Louisiana State Bd. of Medical Examiners; 375 U.S. 411	3
Giatalis v. S/T Darnie, 171 F.Supp. 751	5
Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 310	3, 5
Johnson v. O.F. Ahlmarks, 107 F.Supp. 70	5
Koziol v. Fylgia, 230 F.2d 651	5
Lakos v. Saliaris, 116 F.2d 440, 444	3
Machtronics v. Zirpoli, 316 F.2d 820	3
Moncada v. Lemuria S.S. Co., 491 F.2d 470	3, 5
Moutzouris v. National Shipping & Trading Corp., 196 F.Supp. 482	5
Mutual Life Ins. Co. v. Krejci, 123 F.2d 594	3
O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 193 F.2d 348, 353	3

	<u>Page</u>
Romero v. Weakley, 226 F.2d 399	3
Voyiatzis v. National Shipping & Trading Corp., 199 F.Supp. 920	5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PANAGANGELOS ANTYPAS,	:	
	:	Docket No.
Plaintiff-Appellant,	:	75/7672
- against -		
	:	
CIA. MARITIMA SAN BASILIO, S.A. and	:	PLAINTIFF-
P.D. MARCHESSINI AND CO. (HELLAS) LTD. and	:	APPELLANT'S
P.D. MARCHESSINI AND CO. (NEW YORK), INC.	:	<u>REPLY BRIEF</u>
and the SS EURYBATES, her boats, engines,	:	
tackle and apparel,	:	
	:	
Defendants-Respondents.	:	

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The appellant respectfully submits the following reply
to the respondents' brief.

1.

By ignoring the fact that the within is a motion for
summary judgment, and by ignoring the substantial evidentiary
showing made by the appellant, respondents avoid the two
principal issues raised upon this appeal.

1. That where a claim is made pursuant to the
Jones Act, with an evidentiary showing of
substantial contacts of the transaction with
the United States, jurisdiction may not be
declined.

2. That where a substantial evidentiary showing is made of connecting factors with the United States, summary judgment may not be granted any more than elsewhere when an issue of fact is posed.

2.

Again, ignoring appellant's showing of substantial contacts respondents assume (at its Point II) that the Jones Act cannot be applicable and that the forum non conveniens application is entirely within the discretion of the district court.

The very case of Brillis v. Chandris (U.S.A.) INC., 215 F.Supp. 520 cited by respondents shows the error of this point of view. At page 522 Judge Dawson was careful to point out:

"The court [in Bartholomew v. Universe Tankships, Inc.] went on to point out that if the contacts are sufficient to apply the Jones Act a court may not in its discretion decline jurisdiction.

'Moreover, this is not a matter resting in the discretion of the trial judge, as seems to have been thought to be the case here. The facts either warrant the application of the Jones Act or they do not. Under 28 U.S.C. §1331, once federal law is found applicable the court's power to adjudicate must be exercised.'"

This holding of Bartholomew v. Universe Tankships Inc., 263 F.2d 437 was affirmed by the Supreme Court in Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 310, and reaffirmed by this Court in Moncada v. Lemuria S.S. Co., 491 F.2d 470. To the same effect see O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 193 F.2d 348, 353; Lake v. Saliaris, 116 F.2d 440, 444 England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411; Machtronics v. Zirpoli, 316 F.2d 820; Romero v. Weakley, 226 F.2d 399; Mutual Life Ins. Co. v. Krejci, 123 F.2d 594.

3.

Not only does respondents' case rest on its own view of its evidence only, but respondents are very careless, even with this. Thus, both in respondents' statement of the alleged facts and thereafter in its argument, unpaginated reference is made to "Greek articles". There are no such things, and certainly there is no such in the record before the Court.

So also it is stated by respondents that " . . . it is undisputed that . . . P.D. Marchessini & Co. (New York) Inc. never employed this plaintiff or controlled this vessel's movements or operations." While respondent BASILIO admits employment of the plaintiff, under the test of Cosmopolitan

Shipping Co. v. McAllister, 337 U.S. 783, stated at page 795, P.D. MARCHESSINI (NEW YORK) INC. could just as well be held to be the employer, that case stating:

"The solution of the problem of determining the employer under such a contract depends upon determining whose enterprise the operation of the vessel was. Such words as employer, agent, independent contractor are not decisive. No single phrase can be said to determine the employer. One must look at the venture as a whole. Whose orders controlled the master and the crew? Whose money paid their wages? Who hired the crew? Whose initiative and judgment chose the route and the ports? It is in the light of these basic considerations that one must read the contract. No evidence has come to our attention that indicates the general agent undertook to give orders or directions as to the route or management of the ship while on voyage."

Thus, its cash advanced to the master, paid the seaman's wages. Its judgment and initiative as circumscribed by its liner service, on which the vessel operated, determined the route of the voyages and the ports, and the evidence submitted in respondents' appendix shows that when P.D. MARCHESSINI (NEW YORK) INC. determined to alter the voyage, it did so. (See A31-32 from 10/6 to 10/12.)

4.

The respondents claim that "no basis existed for the application of the Jones Act". With respect to this we rely on our main brief and the cases therein cited. The numerous cases cited by the respondents are either out of date, as

previous to the later cases of this and the Supreme Court or are inapplicable.

Thus, in Damaskinos v. Societa, 255 F.Supp. 919 and Dassigienis v. Cosmos Carriers & Trading Corp., 321 F.Supp. 1253 on motion for summary judgment there was found to be no connecting factors of the transaction sufficient to ground a Jones Act claim. The contrary is true here.

Matilis v. S/T Darnie, 171 F.Supp. 751 was in admiralty and was not a Jones Act claim. Jurisdiction could therefore be discretionary. So also with Koziol v. Fylgia, 230 F.2d 651, Johnson v. O.F. Ahlmarks, 107 F.Supp. 70 and O'Neill v. Cunard White Star, 160 F.2d 446.

Moutzouris v. National Shipping & Trading Corp., 196 F.Supp. 482, wherein the Court first held the Jones Act inapplicable and jurisdiction therefore discretionary, was later distinguished in Voyiatzis v. National Shipping & Trading Corp., 199 F.Supp. 920.

There is no point to taking the cases cited by respondents one by one. They are all inapplicable because in the absence of a bona fide Jones Act claim there are either dismissable or declinable, or they are obsolete by virtue of the later holdings of Bartholomew, Rhoditis and Moncada.

5.

Respondents quote appellant as arguing that "the Shipping

Act of 1916 confers jurisdiction upon United States courts for actions such as this". While the proposition might be true, appellant never so claimed. Appellant has only claimed that respondents' availing themselves of the benefits of United States law is one more substantial contact of the transaction with this country; in short, by accepting the benefits some of the obligations are also undertaken.

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HERBERT LEBOVICI
Of Counsel

Antypas v. Cu - - Lebowitz

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 13 day of Feb 1976 deponent served the within Brief upon:

Poles, Tublin, Pastore
Stratikus

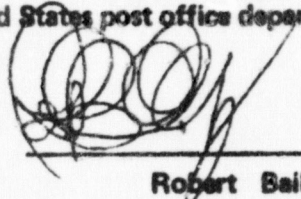
attorney(s) for

appellee

in this action, at

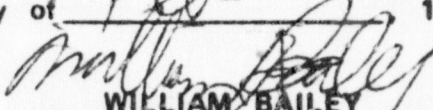
46 Trinity Place
N.Y.C.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.



Robert Bailey

Sworn to before me, this 13
day of Feb 1976.


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976

